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No. 03-1575

IN THE

Supreme Court of the United States

WASHINGTON-DULLES TRANSPORTATION, LIMITED,
Petitioner,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENT METROPOLITAN WASHINGTON AIRPORTS AUTHORITY

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QUESTION PRESENTED

Based on the specific facts and circumstances set forth in the detailed record below, including a "methodical and public review" of proposals and two reports explaining the reasons for the selection decision made in accordance with the applicable contracting procedures, whether the Fourth Circuit erred in affirming the district court's grant of summary judgment and holding: (1) that Respondent Metropolitan Washington Airports Authority had a rational basis for selecting Dulles Taxi Systems, Inc. as the Dulles International Airport taxicab concession contractor and (2) that Petitioner failed to establish that Respondent's selection was arbitrary or irrational.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Metropolitan Washington Airports Authority states that it is an interstate compact, that it has no parent corporation and that there are no publicly held companies that own more than 10% of its stock.

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BRIEF IN OPPOSITION OF RESPONDENT METROPOLITAN WASHINGTON AIRPORTS AUTHORITY

COUNTERSTATEMENT

The Fourth Circuit held that Respondent's selection of Dulles Taxi Systems, Inc. as the Dulles International Airport taxicab concession contractor was: (1) "grounded in a methodical and public review;" (2) had "a rational basis;" and (3) was not "arbitrary or irrational". Pet. App. at 15a-16a. The Fourth Circuit's decision: (1) is based on specific facts and circumstances; (2) is not in conflict with the decision of another United States Court of Appeals; and (3) does not

involve broadly applicable principles of federal law. This case presents no issue worthy of review by this Court.

A. Respondent Metropolitan Washington Airports Authority Is An Interstate Compact, It Is Not A Federal Agency, And It Is Not Funded By Federal, State or Local Tax Dollars

Respondent Metropolitan Washington Airports Authority ("Authority") is an interstate compact created by the Commonwealth of Virginia and the District of Columbia for the purpose of operating two federally owned airports in the metropolitan area of the District of Columbia–Reagan National Airport and Dulles International Airport ("Dulles"). Transfer of the two airports to the Authority was authorized by the Metropolitan Washington Airports Act of 1986 ("Enabling Act" or "Transfer Act") via a 50-year Lease. *See* 49 U.S.C.A. §§ 49101–49112 (West 2004); Va. Code Ann. §§ 5.1-152–5.1-177 (Michie 2003); D.C. Code §§ 9-901–9-926 (West 2003); Pet. App. at 2a, 17a.[1]

The Authority is not a federal agency and is not funded by federal, state or local tax dollars. *See* 49 U.S.C.A. §§ 49102(a), 49106(a)(2), 49106(b), 49111(b); Va. Code Ann. §§ 5.1-156, 161, 168; D.C. Code §§ 9-905, 910, 917. *See generally* Pet. App. at 17a, 29a. The Authority is governed by its Board of Directors ("Board"), which consists of 13 members appointed by the Governors of Maryland and Virginia, the Mayor of the District of Columbia, and the President of the United States. *See* 49 U.S.C.A. § 49106(c); Pet. App. at 18a.

The Transfer Act includes certain provisions specifying how the Authority is to conduct its contracting. *See, e.g.*, 49 U.S.C.A. § 49104(a)(4) (the Authority "to the maximum

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[1] Contrary to the assertion in the Petition at 5, the Authority does *not* operate a third airport, Baltimore-Washington International Airport.

extent practicable shall obtain complete and open competition through the use of published competitive procedures;" however, by a vote of 7 members of the Board the Authority may grant exceptions to this requirement). Pursuant to these provisions, the Authority has adopted its own contracting procedures manual and issues additional contract-specific procedures in each Request For Proposals ("RFP"). Pet. App. at 3a.

B. The Existing Dulles Taxicab Concession Contract

Petitioner was the incumbent Dulles taxicab concession contractor. Under its existing contract with the Authority, Petitioner was required, *inter alia*, to calculate the amount of certain payments, to submit certain financial reports, and to make three different types of payments to the Authority. Pet. App. at 3a, 18a, 25a.

C. The RFP For The New Dulles Taxicab Concession Contract

On August 25, 1999, the Authority issued an RFP for the future operation of the Dulles taxicab concession. Pet. App. at 3a, 18a. The RFP sets forth a two-part evaluation process: (1) a recommendation made by the staff based on the specific evaluation criteria set forth in the RFP and (2) a decision made by the Authority, acting through a Business Administration Committee ("Committee") composed of some members of the Board, and the full Board, based on an exercise of the discretion explicitly granted to the Authority in the RFP. Pet. App. at 3a-6a, 14a-15a, 18a-19a.

With respect to the first part of the evaluation process, the RFP contains six evaluation factors. Pet. App. at 3a. Factors 1, 2, and 4 contain subfactors relating to past experience and performance. Pet. App. at 6a.

With respect to the second part of the evaluation process, the RFP states:

> The Authority will accept the proposal which, *in the Authority's sole judgment*, best meets the Authority's requirements as set forth herein. The Authority reserves the right to reject any or all proposals, to waive irregularities and technicalities in the proposals, to re-advertise, or to proceed to provide the service otherwise when such actions are judged to be *in the best interests of the Authority*.

Pet. App. at 4a (emphasis added).

The RFP, however, precludes the Authority from accepting a proposal if the proponent "is in default or arrearage under any existing or previous agreement with the Authority . . . ." *Id.*

D. The Authority Used A "Methodical And Public" Process To Select The Dulles Taxicab Concession Contractor

A number of proponents, including Petitioner and Dulles Taxi Systems, Inc. ("DTS"), submitted proposals in response to the RFP. The Authority's staff evaluated Petitioner and DTS as the two highest rated proponents, with 843 points and 771 points respectively, of a maximum of 1000 points, and forwarded a draft recommendation paper to the Committee. Pet. App. at 4a-5a, 19a.

In March 2000, proponents, including Petitioner and DTS, were invited to make, and did make, formal presentations to the Committee. During their respective presentations, Committee members asked Petitioner and DTS specific questions relating to various issues including past experience and performance. Pet. App. at 5a, 19a. At a subsequent public meeting held on March 29, 2000, the Committee, following a public debate, voted 3 to 1 to select DTS for the Dulles taxicab concession. *Id.*

Pursuant to the Authority's applicable procedures, Petitioner submitted to the Authority a written pre-award protest of the Committee's selection. In response, in accordance with applicable procedures, the Authority: (1) did not go forward with a contract award to DTS; (2) provided Petitioner and DTS with a written report responding to the protest ("April 2000 Report"); and (3) solicited written comments from Petitioner and DTS regarding the April 2000 Report. Pet. App. 6a, 19a.

The April 2000 Report is significant. First, as the Fourth Circuit noted: "The report set forth the Committee's view that the staff's evaluation of the proposals had not adequately accounted for the past performance of the bidders, which was a consideration under several of the factors set forth in the selection criteria included in the RFP—the 'operation plan,' 'management plan,' and 'industry experience and qualifications' criteria." Pet. App. at 6a. Second, the April 2000 Report explicitly debunks Petitioner's unsupported and unsupportable conflict of interest allegations relating to certain Board members. *See, e.g.*, Pet. at 5. As the Fourth Circuit concluded, relying in part on the April 2000 Report: "There is simply no evidence in the record to support this assertion." Pet. App. at 13a. Third, the existence of the April 2000 Report, and the subsequent due process provided by the Authority, contradicts the fundamental premise of the Petition—that Petitioner was not given the reasons for the Authority's decision. *See, e.g.*, Pet. at 5-8, 15.

At the Board's May 3, 2000 meeting, after considering written submissions provided by the Committee, Petitioner, and DTS, and oral presentations made by Petitioner and DTS, the Board elected to defer its decision on Petitioner's protest pending: (1) receipt of additional information from Petitioner and DTS relating to past experience and performance and (2) consideration of this additional information by the Committee. Pet. App. at 6a, 20a.

On May 5, 2000, the Authority issued RFP Amendment 6, which sought additional information from Petitioner and DTS, including responses to five specific questions relating to past experience and performance. Pet. App. at 6a. Amendment 6 also states: (1) the information requested "would not be used to re-score the previously submitted proposals"; (2) the additional information would be used by the Committee "as the Committee deems appropriate"; (3) the "relevant evaluation criteria set forth in the solicitation will serve as a guide to the Committee in the required exercise of its discretion"; and (4) "[i]n exercising its discretion, the Committee is to recommend to the Board the proposal which, in the Committee's sole judgment, best meets the overall requirements of the Authority to provide the best managed and operated taxicab concession for the Dulles Airport passengers or is otherwise in the best interest of the Authority." Pet. App. 20a.

Although explicitly entitled to do so under the applicable procedures, Petitioner did not protest or otherwise object to any of the terms of Amendment 6. Indeed, Petitioner's response to Amendment 6 included the following affirmative statement concerning its financial past performance: Petitioner "is current and has fully paid all of its financial obligations to [the Authority] without any institution of suit or demand." Fourth Cir. Joint App. at 1727.

On May 25, 2000, after reviewing the additional material provided by Petitioner and DTS in response to Amendment 6, the Committee, by a 2 to 1 vote, reaffirmed its selection of DTS and recommended that the Board deny Petitioner's protest. Pet. App. at 6a, 20a. On June 2, 2000, the Committee provided the Board with a second report explaining the basis for its determination ("June 2000 Report"). As the Fourth Circuit noted, the June 2000 Report "again outlined the reasons underlying [the Committee's] decision, pointing out in particular those areas where the Committee disagreed with

the staff's assignment of points under the selection criteria." Pet. App. at 7a. On June 7, 2000, the Authority's Board met in public session, discussed Petitioner's protest, and denied the protest by an 8 to 1 vote. Pet. App. 7a, 20a.

E. The Proceedings Below

On June 16, 2000, Petitioner filed its initial Complaint in district court. On June 29, 2000, the Authority filed a motion to dismiss for lack of subject matter jurisdiction and standing. Pet. App. at 7a, 20a. On July 19, 2000, the district court granted the Authority's motion to dismiss. On August 1, 2000, DTS began performance of the Dulles taxicab concession contract and is currently performing the contract. On August 29, 2001, the Fourth Circuit reversed the district court's decision and remanded the case to the district court for further proceedings, explicitly stating that in so doing it was expressing "no opinion . . . on the underlying merits of [Petitioner's] claim . . . ." *Washington-Dulles Transp., Ltd. v. Metropolitan Washington Airports Auth.*, 263 F.3d 371, 379 (4th Cir. 2001); Pet. App. at 29a, 41a.

On remand, in response to the Authority's discovery requests, Petitioner produced a statement prepared by Petitioner's outside accounting firm disclosing, for the first time, that Petitioner owed the Authority hundreds of thousands of dollars under the prior contract. In depositions, Petitioner admitted that it owed and had not paid the Authority certain payments under the prior contract. *See* Pet. App. at 25a.

During discovery, Petitioner requested from the Authority information relating to executive sessions of the Authority's Board. In response, the Authority consistently maintained that to the extent Board members and Authority senior management consulted with counsel during executive sessions, these discussions, and the documents prepared by counsel relating to them, were protected under the attorney-

client privilege and/or work product doctrine. The Authority provided Petitioner with a privilege log listing by document its assertions of the attorney-client privilege and the work product doctrine. During subsequent depositions taken by Petitioner, the Authority raised equivalent objections based on the attorney-client privilege and the work product doctrine. Pet. App. at 9a-10a.

A week before the close of discovery, and less than two weeks before the pre-trial conference, Petitioner filed a motion to compel discovery about the Authority's executive sessions. During oral argument on Petitioner's motion, the magistrate judge gave Petitioner instructions on how to frame an objection to a claim of privilege. Petitioner did not follow that guidance. Pet. App. at 10a-11a.

At a subsequent deposition of the Authority's CEO, James Wilding, the Authority offered to permit Mr. Wilding to testify about what had occurred at an executive session, provided that his testimony would not be construed as a waiver of the attorney-client privilege and work product doctrine protections. Petitioner rejected the Authority's offer. Pet. App. at 11a.

The magistrate judge, after in camera review of documents from the Authority's privilege log, denied Petitioner's motion. Petitioner filed a "renewed" motion to compel with the district court. The district court denied Petitioner's motion. Petitioner appealed. Pet. App. 9a-11a. The Fourth Circuit affirmed the district court, noting that Petitioner "chose not to follow the court's guidance and rejected [the Authority's] offer to allow questioning into the very matters into which [Petitioner] professed a need to inquire." Pet. App. at 11a.

On April 18, 2002, the parties filed cross-motions for summary judgment. On May 28, 2002, the district court: (1) granted the summary judgment motion filed jointly by the

Authority and intervenor DTS; (2) denied Petitioner's summary judgment motion; and (3) dismissed the case. Pet. App. at 17a. The district court held that the Authority's decision was based on a "methodical review of the submitted proposals" and that Petitioner had failed to demonstrate that the decision "had no rational basis." Pet. App. at 24a. In the alternative, the district court held that Petitioner was "not in a position to bid on the RFP" because Petitioner

> was and remains in default or arrearage under its previous agreement with the Authority and was in default or arrearage when it submitted its proposal and Best and Final Offer. [Petitioner] did not come forward with payment or information about the default or arrearage prior to submitting its bid. Therefore, according to the language in the RFP, [Petitioner] was and is disqualified from competing for the contract . . . .

Pet. App. at 24a-25a. Petitioner appealed the district court's decision.

On July 26, 2002, in accordance with the statutes creating the Authority, the Authority filed an action against Petitioner in the Circuit Court of Fairfax County alleging that Petitioner was in default and arrears under the prior contract. *See* Va. Code Ann. § 5.1-173 ("[C]ourts of the Commonwealth of Virginia shall have original jurisdiction of all [contract] actions brought by . . . the Authority"); D.C. Code § 9-922 (same). On October 31, 2003, the Circuit Court entered Judgment in favor of the Authority and awarded the Authority the sum of $1,132,103.73, plus attorneys fees, expenses, and statutory costs. *See* Final Judgment Order, *Metropolitan Washington Airports Auth. v. Washington-Dulles Transp., Ltd.*, Law No. 206086 (Va. Cir. Ct. Ffx. Cty., Oct. 31, 2003), Resp. App. at 1a-3a.

On January 30, 2004, the Fourth Circuit affirmed the district court's decision, finding that the record contained "an abundance of information" about why the Authority made its

selection, including "two reports issued by the Committee explaining why it selected [DTS] over [Petitioner] for the new contract instead of accepting the staff's evaluation and recommendation." Pet. App. at 13a. The Fourth Circuit held that the Authority's decision was consistent with the published competitive procedures contained in the RFP, was "grounded in a methodical and public review of the proposals," had "a rational basis," and was not "arbitrary or irrational." Pet. App. at 14a-16a. Based on this conclusion, the Fourth Circuit determined that it was "unnecessary to consider" the alternative basis for sustaining the Authority's summary judgment motion–that Petitioner was disqualified from bidding because it was in arrears under its prior contract with the Authority. Pet. App. at 16a n. 2.

REASONS FOR DENYING THE PETITION

This case presents no question worthy of this Court's review.

I. THE FOURTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER UNITED STATES COURT OF APPEALS

The Fourth Circuit's decision is not in conflict with the decision of any other United States Court of Appeals. No other Court of Appeals has issued a decision that has reviewed the Authority's selection of a contractor made pursuant to the specific contracting procedures applicable to a competition conducted by the Authority. In particular, no other Court of Appeals has reviewed the Authority's selection of a contractor under an Authority RFP, such as the one in this case, that contains a clearly disclosed two-step evaluation process: (1) a recommendation made by the staff based on detailed evaluation criteria set forth in the RFP and (2) a decision made by the Authority based on an exercise of

discretion explicitly granted to the Authority in the RFP. *See* Pet. App. at 3a-7a, 14a-15a.

A. The Fourth Circuit's Decision Regarding The Authority's Use Of Past Performance As An Evaluation Factor Is Not In Conflict With The Decision Of Any Other United States Court Of Appeals

Petitioner's alleged "conflict" regarding the use of "past performance" as an evaluation factor is devoid of merit. Pet. at 12-13. First, the factual premise for Petitioner's argument—that past performance was not an evaluation factor, that prior to the Fourth Circuit's decision Petitioner was not aware of the Authority's concerns relating to past performance, and that the Fourth Circuit, after the fact, had "suggested" that the Authority's selection was based on past performance—is blatantly contrary to the record. Pet. at 6, 12. The RFP disclosed that past performance would be considered under several evaluation factors. Pet. App. at 6a, 15a, 18a. In addition, the Authority, after the submission of initial proposals and prior to contract award, sought additional information regarding Petitioner's past performance and informed Petitioner that it was evaluating past performance. These requests for information and disclosures by the Authority occurred in hearings, written requests, and an amendment to the RFP. Pet. App. at 5a-7a. It is obvious that Petitioner understood these requests and disclosures—Petitioner, in response, provided information to the Authority relating to its past performance. Pet. App. at 5a-6a, 14a-15a. The Authority also explained its concerns relating to Petitioner's past performance in two written Reports. *See* Pet. App. at 6a-7a, 14a-15a. Thus, there is no factual basis for Petitioner's allegation.

Second, Petitioner misstates and misapplies federal procurement law regarding the use of past performance as an evaluation factor. Pet. at 13. Petitioner asserts that past

performance is not properly part of an evaluation, but rather part of a post-evaluation responsibility determination. As a matter of federal government contracts law, Petitioner is wrong. The Federal Acquisition Regulation ("FAR") requires agencies, with limited exceptions, to include past performance as a factor in the evaluation process. 48 C.F.R. § 15.304(c)(3). *See generally Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 203 (D.C. Cir. 1984) (Scalia, J.) (prior to requirement in FAR, proper to consider financial past performance in evaluation process). That is what the Authority did. Thus, there is no conflict.

But, even if the Petitioner were correct concerning how past performance must be used by federal agencies in federal procurements, which it is not, there is no conflict. The Authority is not a federal agency, this case does not involve a federal procurement, and the FAR does not apply. The FAR applies to the acquisition "by contract with appropriated funds of supplies or services . . . by or for the use of the Federal Government through purchase or lease," 48 C.F.R. §§ 1.104, 2.101 (definition of "Acquisition"). This case does not involve the acquisition of supplies or services using appropriated funds by or for the use of the Federal Government. This case involves an Authority concession contract under which the contractor pays the Authority for the right to operate a taxicab concession. Federal agency procurement law does not apply. Pet. App. at 17a-18a, 49 U.S.C.A. §§ 49102(a), 49106(a)(2), 49111(b); GAO Report 02-36 at 2 (March 1, 2002) ("Authority is not required to follow federal procurement statutes and regulations"). *See* Pet. App. at 15a. Petitioner's alleged conflict is simply nonexistent.

B. The Fourth Circuit's Decision Is Based On A *De Novo* Review Of The Record, Does Not Defer To The Authority, And Is Not In Conflict With The Decision Of Any Other Court Of Appeals

Petitioner alleges that the Fourth Circuit's decision is in conflict with the decisions of other Courts of Appeals because it gives deference to an "agency" when an agency declines to provide reasons for its decision. Pet. at 14-15. Petitioner's allegation is clearly contrary to the record. The Fourth Circuit did not defer to the Authority. The Fourth Circuit conducted a de novo review of the record. Pet. App. at 12a. The Fourth Circuit found that the Authority, which is not an agency, had provided a detailed explanation of the reasons for its decision. Pet. App. at 6a-7a. *See* 49 U.S.C.A. § 49106(a). Indeed, the Fourth Circuit noted that the record contains "an abundance of information" regarding the reasons for the Authority's actions including "two reports . . . explaining why it selected [DTS] over [Petitioner] . . . ." Pet. App. at 13a. Based on this extensive review of the record–not deference–the Fourth Circuit concluded that the Authority's decision: (1) was "grounded in a methodical and public review of the proposals;" (2) was based on "a rational basis;" and (3) was not "arbitrary or irrational." Pet. App. at 15a-16a. Petitioner's alleged conflict is pure fiction.

II. THIS CASE DOES NOT PRESENT AN IMPORTANT, BROADLY APPLICABLE, QUESTION OF FEDERAL LAW THAT SHOULD BE ADDRESSED BY THIS COURT

This case is fact specific and involves a statutory scheme applicable to only one interstate compact, the Authority. *See* 49 U.S.C.A. §§ 49101-49112; Va. Code Ann. §§ 5.1-152–5.1-177; D.C. Code §§ 9-901–9-926. This case does not

present an important, broadly applicable, question of federal law that should be addressed by this Court.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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